

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
American Samoa License, Inc.)
Petition for Assumption of)
State Commission Jurisdiction Under)
Section 252(e)(5) of the Communications Act)
)

CC Docket No. 98-239

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EXHIBIT TO THE PETITION
FILED IN THE MATTER OF

**OPPOSITION OF THE AMERICAN SAMOA
TELECOMMUNICATIONS AUTHORITY**

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**OPPOSITION OF THE AMERICAN SAMOA
TELECOMMUNICATIONS AUTHORITY**

The American Samoa Telecommunications Authority ("ASTCA"), by counsel, respectfully submits this comment in opposition to the American Samoa License, Inc. ("ASLI") petition. 1/

SUMMARY

The Commission should dismiss ASLI's petition for three reasons:

- (1) The Governor of American Samoa, acting as Telecommunications Regulatory Commissioner ("TRC"), has proper authority to discharge the regulatory and arbitration duties of a State commission, as a territorial court of competent jurisdiction has already concluded. *American Samoa License, Inc. v. Sunia*, CA No. 116-98 (High Court of American Samoa, Trial Division, Dec. 21, 1998).
- (2) The petition is premature and unripe because the state commission for American Samoa is in the process of conducting arbitration pursuant to Section 252, and has not yet had the chance to act (or to fail to act).
- (3) The FCC lacks authority to take the actions requested by ASLI.

1/ See Public Notice, *Pleading Cycle Established for Comments on American Samoa License, Inc. Petition for Assumption of State Commission Jurisdiction Under Section 252(e)(5) of the Communications Act*, DA 98-2584, CC Docket No. 98-239, (released Dec. 21, 1998).

INTRODUCTION AND FACTUAL BACKGROUND

American Samoa, an unincorporated territory of the United States, is located 14 degrees south of the equator, about 2,300 miles southwest of Hawaii, more than 4,100 miles southwest of San Francisco, and approximately 40 miles east of the independent country of Western Samoa, with which American Samoa has close cultural, economic, and family ties. Persons born in American Samoa are nationals but not citizens of the United States. As of July 1, 1996, the population of American Samoa was 58,000.

American Samoa has been a United States territory since 1900. Congress has delegated civil authority in American Samoa to the President, who has re-delegated the authority to the Secretary of the Interior. With the approval of the Secretary, American Samoa has its own constitution and is governed by a locally elected Governor and Legislature. The Governor has broad authority to promulgate executive regulations that do not conflict with local statutes.

The local communications network in American Samoa, with connections to other U.S. and international points, was originally built by the U.S. Navy and the U.S. Department of the Interior, which formerly exercised governmental authority in the territory. The network was inherited by the American Samoa Government ("ASG"). Until 1997, it was operated by the American Samoa Office of Communications ("ASOC"), an agency in the executive branch of the ASG, with a Director who reported directly to the Governor.

In January 1998, however, Governor Tauese P. Sunia issued Executive Orders establishing the American Samoa Telecommunications Authority (“ASTCA”). (Copies of those Executive Orders are included in attachments to ASLI’s petition.) The ASTCA is the successor to the ASOC, but is not an integral component of the executive branch of the ASG. Instead, ASTCA is governed by a five-member Board of Directors, and is managed by an Executive Director who reports to that Board -- not to the Governor. Unlike its predecessor, ASTCA’s budget is independent from that of the ASG. ASTCA was created in large measure in order to establish a more businesslike management structure and to facilitate compliance with the Telecommunications Act of 1996. 2/

ASTCA (as well as its predecessor, ASOC) has taken active steps to come into compliance with the Telecommunications Act of 1996. Its long-distance arm reduced rates substantially and established integrated rates, as required by Section 254(g) of the Communications Act of 1934, as amended (“Act”). 3/ Governor Sunia issued an Executive Order in 1997 determining that, in the absence of a public utilities commission, he was the “official . . . which . . . has regulatory jurisdiction with respect to intrastate operations of carriers,” 47 U.S.C. § 153(41), and is thus the “state commission” for American Samoa, and in that role designated

2/ See The American Samoa Government’s Proposed Rate Integration Plan for American Samoa, *Policy and Rules Concerning the Interstate, Interexchange Marketplace , Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61 (filed October 1, 1997) (*inter alia*, committing to reorganization of operations of ASOC).

3/ *Id.*

ASTCA an "eligible telecommunications carrier" for universal service purposes. 4/ ASTCA has made the required payments into the universal service fund and has implemented the low-income component of the federal universal service program. 5/ ASTCA has requested a waiver that would enable it to participate in the access tariffs of the National Exchange Carriers Association ("NECA") and to participate in the high-cost component of the federal universal service program. 6/

ASTCA also has participated actively in interconnection negotiations with ASLI. From May through November, 1998, the parties met several times and exchanged a number of drafts of an interconnection agreement. ASTCA accepted most of the rates, terms, and conditions proposed by ASLI, and in many instances offered provisions that went well beyond its statutory obligations. The negotiations broke down in late November, however, due largely to ASLI's reluctance to accept

4/ See Letter from David L. Sieradzki to Magalie Roman Salas, *ex parte* in *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed Dec. 4, 1997) (transmitting Executive Order 13-1997).

5/ See Letter from David L. Sieradzki to Magalie Roman Salas, *ex parte* in *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed March 9, 1998).

6/ American Samoa Government and the American Samoa Telecommunications Authority, *Petition for Waivers and Declaratory Rulings to Enable American Samoa to Participate in the Universal Service High Cost Support Program and the National Exchange Carrier Association Pools and Tariffs*, CC Docket No. 96-45, AAD/USB File No. 98-41 (filed Feb. 6, 1998); Public Notice, *Commission Seeks Comment On Petition Of The Samoa Government And The American Samoa Telecommunications Authority*, DA 98-417, CC Docket No. 96-45, AAD/USB File No. 98-41 (released March 3, 1998).

the Governor's authority to act as the State commission in approving the agreement pursuant to Section 252(e) and in refereeing disputes that may arise in the future.

On November 30, 1998 ASLI's attorney sent a letter to the Governor threatening litigation unless he intervened on ASLI's behalf with the ASTCA board. On December 2, 1998, ASTCA formally asked the Governor to arbitrate the differences between the parties. On December 4, ASLI filed a lawsuit against the Governor, ASG, and ASTCA in the High Court of American Samoa seeking an injunction to prevent the arbitration from going forward. ASLI filed its petition initiating the instant proceeding shortly thereafter.

Governor Sunia took a number of actions to lay the groundwork for the arbitration. On December 7, he issued a letter to ASTCA and ASLI setting a scheduling conference for the arbitration proceeding. On December 8, 1998, he adopted Regulations of Local Telecommunications Operations (attached to ASLI's petition). Those Regulations, among other things, identify the Governor as the Telecommunications Regulatory Commissioner ("TRC"), impose duties on telecommunications carriers (largely parallel to the duties established in Sections 201 and 202 of the Act), and establish procedural rules for contested proceedings. On December 14, 1998, ASLI filed its own Contingent Petition for Arbitration, and on December 21 the Governor issued a letter to the parties establishing deadlines for their written responses to one another's filings in the arbitration proceedings. A number of other, related documents have been filed with the Governor by both parties. A procedural conference is scheduled for January 5, 1999.

On December 21, 1998, the High Court of American Samoa issued its decision, rejecting ASLI's request for an injunction and entering judgment for the defendants. *American Samoa License, Inc. v. Sunia*, CA No. 116-98 (High Court of American Samoa, Trial Division, Dec. 21, 1998). (A copy of the decision is included in Attachment A.) The Court found that the Governor has authority to exercise regulatory authority and to arbitrate the dispute pursuant to the federal Act. It also found that the American Samoa Constitution grants the Governor authority to issue executive regulations (and to regulate the telecommunications industry) as long as those regulations do not conflict with other local or federal laws, and that the Governor's regulations "fill a void left by the Legislature" and "represent a constitutionally valid exercise of executive power." *Id.* at 4.

ARGUMENT

I. THE GOVERNOR, ACTING AS TELECOMMUNICATIONS REGULATORY COMMISSIONER, IS THE LAWFUL "STATE COMMISSION" FOR AMERICAN SAMOA.

The Act places the exclusive responsibility for arbitrating and overseeing implementation of interconnection agreements squarely upon "State commissions" -- *not* the FCC. ^{7/} The law explicitly contemplates that a single official can serve as the arbitrator: it defines a "State commission" as "the commission, board, *or official* (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of

^{7/} 47 U.S.C. § 252(b)-(e).

carriers.” 8/ The Act also makes it clear that “[t]he term ‘State’ includes . . . the Territories and possessions.” 9/

ASLI contends that the Governor cannot act as the “State commission” for American Samoa pursuant to Section 252, because no American Samoa constitutional provision or statute explicitly grants him authority to regulate the operations of telecommunications carriers within American Samoa. 10/ ASLI made the same arguments to the High Court of American Samoa, which rejected them conclusively. *ASLI v. Sunia*.

Of course, the High Court of American Samoa is in a far better position to construe the authority of a territorial official under territorial law than is the FCC. 11/ The Commission must defer to the Telecommunications Regulatory Commissioner of American Samoa and allow the pending arbitration to proceed.

8/ 47 U.S.C. § 153(41) (emphasis added).

9/ 47 U.S.C. § 153(40).

10/ Petition at 7-8.

11/ “Suffice it to say that it is established Commission policy to avoid becoming embroiled in interpreting state laws” *Blue Ridge Cable Television, Inc.*, 58 FCC 2d 8 (1976). “We have no desire to become involved in the interpretation of state laws. We assume the regularity and accuracy of such local interpretation of state law unless shown otherwise.” *Citizens Cable of Allen County, Inc.*, 53 FCC 2d 1116 (1975).

II. THE PETITION IS UNRIPE BECAUSE THE STATE COMMISSION FOR AMERICAN SAMOA HAS NOT "FAILED TO ACT."

The only circumstance in which the FCC may act as the arbitrator is where "a State commission fails to act to carry out its responsibility." 12/ In this case, it is far too early for the FCC to conclude that this has occurred. The TRC has established procedural deadlines and established a scheduling conference, but has not yet had the opportunity to consider the substantive issues in dispute. 13/ Accordingly, ASLI's petition should be dismissed as premature or unripe.

Indeed, the Governor, in his role as the TRC, has been making every effort to conduct the arbitration proceeding pursuant to the strict deadlines provided in Section 252(b), notwithstanding the efforts of ASLI to delay and derail the arbitration proceeding. Within five days after receipt of the initial petition for arbitration from ASTCA on December 2, 1998, the Governor's office advised ASLI that its statutory response date was December 28, 1998, and scheduled a conference for January 5, 1999, to establish deadlines for the submission of evidence, discovery (if necessary), briefs, and arguments. The TRC subsequently denied ASLI's request to hold the arbitration proceeding in abeyance, 14/ accepted ASLI's contingent

12/ 47 U.S.C. § 252(e)(5).

13/ For a summary of ASTCA's positions with respect to some of those issues, see Letter from David L. Sieradzki to Governor Tauese P. Sunia (December 30, 1998) (included in Attachment B).

14/ In declining to delay the arbitration, the Governor expressed his intention to move the arbitration proceeding expeditiously so that ASLI can obtain interconnection and commence operation as early as possible. He emphasized his responsibility under federal law and local regulations to foster competition in the

petition for arbitration, and advised ASTCA that its statutory deadline for response was January 8, 1999. The TRC ordered the initial conference to proceed on January 5, as originally scheduled.

It is worth noting that the FCC has rejected every petition filed to date requesting it to assume jurisdiction over arbitration before state commissions. In each of these cases, the FCC held that, notwithstanding the petitioning party's disagreement with the substantive results and (in some cases) the procedural steps taken by the state commission, the FCC could not find that the state commission had "failed to act." 15/

III. THE FCC LACKS STATUTORY AUTHORITY TO ASSUME JURISDICTION OVER THIS ARBITRATION PROCEEDING.

The FCC cannot assume jurisdiction over an arbitration proceeding in progress before a state commission unless the specific requirements of Section 252(e)(5) are met. The U.S. Court of Appeals for the Eighth Circuit held that "the FCC's authority . . . does not enable the Commission to review state commission determinations or to enforce the terms of interconnection agreements under the Act . . . and that state commissions are vested with the power to enforce the terms

local telecommunications marketplace and to assure interconnection between carriers on fair and reasonable terms.

15/ *Petition of MCI for Preemption*, 12 FCC Rcd 15594 (1997); *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.*, 12 FCC Rcd 1755 (1997); *Armstrong Communications, Inc.*, 13 FCC Rcd 871 (Com. Car. Bur. 1998).

of agreements they approve.” 16/ The Commission thus should reject ASLI’s apparent request that it waive the statutory requirements, mirrored in Section 51.801 of the Commission’s rules, in order to assert jurisdiction over this matter. 17/

In particular, the Act provides no statutory basis for the Commission to act in the case of an alleged “conflict of interest,” notwithstanding ASLI’s argument to the contrary. And the “conflict of interest” alleged by ASLI does not exist. Such a conflict may have existed in the past when the American Samoa Government’s telecommunications operations were a component of the government structure under the direct supervision of the Governor. But this has not been the case since the inception of the ASTCA in January 1998. ASTCA is now a semi-autonomous organization governed by a five-member Board of Directors, and is not controlled by the Governor. Contrary to ASLI’s petition, 18/ the Governor does not oversee the operations of ASTCA, and the revenues generated by ASTCA do not flow into the ASG treasury. Daily operations are managed by an Executive Director, who is hired by the Board and who reports to the Board. Revenues generated by ASTCA are retained to support its own budget, including payroll, and are *not* deposited in the general fund of ASG. ASTCA has responsibility for its own accounting and financial management.

16/ *Iowa Utilities Board v. FCC*, 120 F.3d 753, 803-04 (8th Cir. 1997), *Supreme Court review pending*.

17/ ASLI Petition at 5-6.

18/ Petition at 11.

Moreover, the cases cited by ASLI regarding conflicts of interest disqualifying arbitrators are inapposite. ^{19/} ASLI does not contend that the Governor has a *personal* interest in the arbitration; ASLI contends merely that the Governor has an *institutional* interest as the head of a government which oversees and derives revenue from ASTCA. In the case of an institutional relationship, the federal courts have ruled that a pecuniary interest does not automatically disqualify a decision-maker. ^{20/} In this case, ASLI has made no showing that the Governor's institutional interest in ASTCA provides a "strong" motive for biased decision-making. Without such a showing, the Governor is entitled to the normal presumption that an administrator is a person of conscience capable of making a

^{19/} ASLI's attempt to disqualify the Governor is not supported by *Hunt v. Mobil Oil Corp.*, 654 F.Supp. 1487 (S.D.N.Y., 1987), where the court *rejected* allegations that arbitrators were tainted by undisclosed client relationships and business connections and by government policy-making roles. The court in *Hunt* observed that arbitrators are expected to be involved in other businesses and to have other responsibilities and are not disqualified by the same "appearance of bias" which might disqualify a judge. 654 F.Supp. at 1497-98. Neither is this case similar to *Burlington Northern R.R. Co. v. TUCO, Inc.*, 960 S.W. 2d 629 (Tex. 1997), which involved failure by an arbitrator to disclose a *personal* interest, not an institutional interest.

^{20/} See *AEP Chapter Housing Ass'n v. Berkeley*, 114 F. 3d 840 (9th Cir. 1997) (administrative rent board could properly regulate and assess fees against a sorority, even though the board was funded by the fees it assessed). An institutional pecuniary relationship does not disqualify an official unless the pecuniary interest provides a "strong" motive for the official to rule in a biased manner. *Id.* at 844-85. See also *Commonwealth of N. Mariana Islands v. Kaipat*, 94 F.3d 574, 581-82 (9th Cir. 1996) (trial judges did not violate due process by collecting civil and criminal fines which were earmarked for courthouse construction); *Hirsh v. Justices of the Supreme Court of Cal.*, 67 F.3d 708, 713-14 (9th Cir. 1995) (California Supreme Court could properly assess disciplinary fines, even though the fines were used to fund the State Bar).

fair decision. 21/ ASTCA's minimal revenue contribution to ASG's overall budget is below the *de minimis* standard which the courts have applied in evaluating institutional relationships. 22/

Finally, ASLI is incorrect in its argument that the FCC should assume jurisdiction because "no United States Federal district court has jurisdiction over American Samoa" to conduct appellate review pursuant to Section 252(e)(6). 23/ In fact, it is well established that review of legal proceedings in American Samoa can be obtained in the U.S. District Court for the District of Columbia, despite the fact that American Samoa is outside the geographical bounds of the court's jurisdiction. 24/ ASLI can obtain federal judicial review of an arbitration decision of the TRC in the U.S. District Court for the District of Columbia by naming the Secretary of the Interior as a party. 25/

21/ See *Withrow v. Larkin*, 421 U.S. 35 (1975).

22/ ASTCA's only financial contribution to ASG is the servicing of certain ASG debt obligations which are secured by telecommunication revenues. This debt service amounts to approximately \$1 million per year, which represents about one-half of one percent of ASG's total annual budget of approximately \$200 million. In *Hirsh*, the Ninth Circuit held that the collection of approximately one percent of State Bar funds through the assessment of disciplinary fines did not violate due process. 67 Fed. 3d at 713-14. And in *Kaipat*, the court held that due process was not violated where the amount of construction funds collected by fines was only about five percent of budgeted costs. 94 F.3d at 581-82.

23/ Petition at 9.

24/ *King v. Morton*, 520 F.2d 1140, 1143-44 (D.C. Cir. 1975).

25/ The Court of Appeals has ruled that this review path into the Federal Article III judicial system is reasonable and constitutional. *Corporation of the Presiding*

CONCLUSION

The Commission should reject ASLI's dilatory petition, and should direct the parties to work through the process mandated by Section 252 before the duly constituted "state commission" for American Samoa. In that regard, ASTCA stands ready to proceed expeditiously with the pending arbitration, and will object to any delay or circumvention of the statutory arbitration procedures. In the meantime, ASTCA also stands ready to continue negotiations of the open issues, so that further litigation can be avoided and the American Samoa public can receive ASLI's service and the benefits of competition.

Respectfully submitted,

AMERICAN SAMOA
TELECOMMUNICATIONS AUTHORITY

By: David Sieradzki

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Dated: December 31, 1998

Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel, 830 F.2d 374, 387 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988).

CERTIFICATE OF SERVICE

I, Cecelia Burnett, hereby certify that on this 31st day of December, 1998, copies of the Opposition of the American Samoa Telecommunications Authority, CC Docket No. 98-239 were served on the parties listed below by hand delivery or first class mail.



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*First Class Mail

ATTACHMENT A

IN THE HIGH COURT OF AMERICAN SAMOA

TRIAL DIVISION

AMERICAN SAMOA LICENSE, INC.

Plaintiff,

v.

TAUESE P.F. SUNIA, as Governor
of American Samoa, GOVERNMENT OF
AMERICAN SAMOA, AMERICAN SAMOA
TELECOMMUNICATIONS BOARD OF
DIRECTORS and ALEKI SENE, its
Executive Director,

Defendants.

CA No. 116-98

OPINION AND ORDER

1030
12/22/98

Before KRUSE, Chief Justice, TUA'OLO, Associate Judge, and
LOGOAI, Associate Judge.

Counsel: For Plaintiff, Charles V. Ala'ilima
For Defendants Sunia and American Samoa Government,
Henry W. Kappel, Assistant Attorney General
For Defendants American Samoa Telecommunications Board
of Directors and Aleki Sene, Brian M. Thompson

On December 4, 1998, plaintiff American Samoa License, Inc.
("ASLI") filed a complaint seeking declaratory relief and an
injunction directing defendant Tauese P.F. Sunia ("the Governor")
to refrain from acting in the capacity of a "state commission"
for purposes of regulating the telecommunications industry in
American Samoa. ASLI further filed an application for temporary
restraining order and order to show cause for preliminary
injunction on December 14, 1998. Defendants' joint memorandum in
opposition to issuance of temporary restraining order or order to
show cause, along with a joint motion to dismiss complaint and

memorandum in support, were submitted on December 17, 1998. The next day, ASLI filed a supplemental memorandum in support the application for temporary restraining order and order to show cause.

A hearing was held on December 18, 1998, with all counsel present. At the hearing, both parties agreed that the material facts in this case are not in dispute. For that reason and pursuant to T.C.R.C.P. 65, this court deems it appropriate to consolidate the hearing of the preliminary injunction with a trial of the action on the merits.

FACTS

As noted above, the relevant facts in this matter are uncontested. ASLI is a private corporation engaged in the telecommunications business. On July 8, 1998, ASLI made a request to the American Samoa Telecommunications Authority ("ASTCA") to interconnect with ASTCA's facilities pursuant to § 252 of the federal Communications Act of 1934. 47 U.S.C.S. § 252.

The 1996 amendments to this Act set forth arbitration procedures to be followed for negotiating the terms and conditions of that interconnection, and those procedures include a role for the "state commission" charged with regulation of the telecommunications industry. 47 U.S.C.S. § 251. As early as October, 1998, ASLI was informed that the Governor was identified as the state commission for these purposes. On December 8, 1998, the Governor issued "emergency Regulations of Local

Telecommunications Operations," officially declaring himself to be the "Telecommunications Regulatory Commissioner," and thereby purporting to assume jurisdiction over the parties' dispute pursuant to 47 U.S.C.S. § 153(40) and (41). See Attachment C to Defendants' Joint Memorandum in Support, December 14, 1998.

DISCUSSION

As a threshold matter, defendants claim that this court does not have subject matter jurisdiction over this issue. This court, however, has jurisdiction to issue injunctions and declaratory relief. A.S.C.A. § 43.1301 et. seq.; A.S.C.A. § 43.1101.

ASLI bases its complaint on the grounds that the Governor has not been granted statutory authority to regulate telecommunications in the Territory. In this instance, the Governor not only has statutory authority but Constitutional authority to regulate. Under the federal Telecommunications Act, a state commission is charged with regulating the telecommunications industry in respect to intrastate operations, 47 U.S.C.S. § 252. A state commission is defined as "the commission, board or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C.S. § 153(41). The term state includes territories and possessions. 47 U.S.C.S. § 153(40). American Samoa, therefore, is given the power to regulate its own telecommunications industry.

In addition, the Governor has explicit constitutional powers


to issue executive regulations not in conflict with the laws of the United States applicable to American Samoa, laws of American Samoa, or with the American Samoa Constitution. REV. CONST. AM. SAMOA. art. IV, sec. 6. The Governor's regulation of the telecommunications industry does not conflict with any laws of the United States applicable to American Samoa, laws of American Samoa or with the American Samoa Constitution. Rather, the Governor's regulations fill a void left by the Legislature, and therefore represent a constitutionally valid exercise of executive power.

ORDER

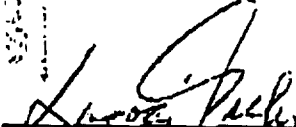
For the foregoing reasons and pursuant to T.C.R.C.P. 65, the petition for injunctive relief is denied and judgment shall be entered for the defendants.

It is so Ordered.

Dated: 12/21/98


F. MICHAEL KRUSE
Chief Justice


TUALO M.E. FRUEAN
Associate Judge


LOGOAI SIAKI P.
Associate Judge

ATTACHMENT B

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December 30, 1998

Honorable Tauese P. Sunia
Governor of American Samoa
Pago Pago, American Samoa 96799

**Re: TRC Case No. 01-98:
American Samoa Telecommunications Authority v.
American Samoa License, Inc.; Petition for Arbitration of
Interconnection Agreement**

Dear Governor Sunia:

I am writing on behalf of the American Samoa Telecommunications Authority ("ASTCA") to respond to the Reply to Petition for Arbitration submitted by American Samoa License, Inc. ("ASLI") on December 28, 1998. We note that this response is not required pursuant to the schedule established for this arbitration proceeding on December 21, 1998 by the Telecommunications Regulatory Commissioner ("TRC"). Nonetheless, ASTCA is submitting this letter, in response to ASLI's request (*see* Reply at 3), in order to be as accommodating as possible to ASLI, to provide complete information to the TRC, and to facilitate an expeditious resolution of the matters in dispute.

This letter addresses three topics: (1) ASLI's argument that this dispute may not be subject to arbitration under Section 252 of the federal Communications Act of 1934, as amended ("Act"); (2) the issues that ASLI lists as remaining in dispute in its Contingent Petition and its Reply; and (3) other possible substantive differences between the parties.

1. This Dispute Is Properly Before the TRC Under Section 252 Of The Act

ASLI contends that ASTCA's petition for arbitration may not be subject to Section 252 of the Act because, ASLI argues, ASTCA is not an "incumbent

Honorable Tauese P. Sunia

December 30, 1998

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local exchange carrier" and the arbitration provisions of Section 252(b) refer to "incumbent local exchange carriers." ASLI is partially correct. Indeed, ASTCA is *not* an incumbent local exchange carrier under the definition in Sections 251(h) and 252(j), so the arbitration provisions of Section 252(b) do not expressly apply to it.

Nevertheless, this dispute is properly before the TRC. First, ASTCA is comparable in some respects to an incumbent local exchange carrier. Other than the arbitration provisions of Section 252(b), there appears to be no remedy under the Act for interconnection disputes between carriers that are not incumbent local exchange carriers. The TRC may, as a discretionary matter, apply the procedures of Section 252(b) to this dispute to ensure the establishment of reasonable interconnection arrangements between the parties.

Second, ASLI is wrong in its assertion that the remainder of Section 252 applies only to interconnection with incumbent local exchange carriers. Specifically, Section 252(e) provides that all negotiated or arbitrated interconnection agreements be submitted to the State commission for approval. Section 252(e)'s terms are not limited to interconnection agreements with incumbent local exchange carriers. Given that Section 252(e) of the Act requires interconnection agreements between carriers to be approved by the State commission for American Samoa -- the TRC -- it makes sense for that agency to exercise its regulatory powers to resolve differences between carriers and ensure that reasonable interconnections are established expeditiously.

Finally, Section 12.0603(C) of the American Samoa Regulations of Local Telecommunications Operations requires all telecommunications carriers, including ASLI as well as ASTCA, "[t]o establish interconnection with other telecommunications carriers, subject to the orders of the Commissioner;" and Section 12.0608 establishes procedures for the TRC to resolve disputes over matters within its jurisdiction. Accordingly, the TRC may address this dispute pursuant to either or both Section 252 of the federal Act and/or pursuant to its own regulatory authority. *See ASLI v. Sunia*, CA No. 116-98 (H.C.T.D. 1998).

2. The Issues Identified By ASLI Can Be Resolved Readily

ASLI, in its Reply to ASTCA's Petition for Arbitration and in its Contingent Petition, lists five substantive issues that remain in dispute: "(i) what entity will arbitrate disputes arising in the future; (ii) the manner in which ASLI's

Honorable Tauese P. Sunia
December 30, 1998
Page 3

toll traffic will be transported across ASTCA's local network; (iii) the charges for such transport; (iv) the inconsistencies between the two interconnection agreements proffered by ASTCA; and (v) the terms of interstate access." See ASLI Reply at 4-5. These issues can be resolved readily: The High Court's decision upholding the Governor's authority to act as the TRC is dispositive with respect to ASLI's Issue (i). And ASLI's Issues (ii) through (v) must be dismissed from this proceeding, as they relate to interstate access service, which is subject to the exclusive jurisdiction of the Federal Communications Commission ("FCC") and is outside the TRC's authority (as ASLI acknowledges, see ASLI Reply at 5 n.3).

a. The Role of the Governor as TRC

ASLI first questioned, and then brought a legal challenge to, the Governor's authority to arbitrate the instant dispute as well as disputes that may arise in the future. In ASTCA's letter requesting arbitration, we highlighted this issue alone because we were not aware of whether any other differences remained between the parties' positions; ASLI's letters had mentioned only this issue.^{1/} The issue, of course, now has been resolved conclusively by the High Court's decision in *ASLI v. Sunia* that the Governor possesses the requisite authority and need not disqualify himself due to a supposed conflict of interest. To the extent this issue remains pending in this arbitration proceeding, the TRC can resolve it readily, consistent with the High Court decision.

Arguably, ASLI raises a distinct issue regarding the Governor's/TRC's role in arbitrating *future* interconnection-related disputes between the parties (as opposed to the TRC's authority to resolve the instant dispute regarding the *formation* of the interconnection agreement). The most recent draft interconnection agreement proffered by ASLI, on November 4, 1998, proposed separate, *ad hoc* arbitration panels for each dispute (section 9.1). By contrast, the most recent draft interconnection agreement submitted by ASTCA, on November 19, 1998, provides for arbitration of disputes before the local regulatory agency (section 9.1). As discussed above, the High Court has rejected ASLI's claims that the Governor lacks regulatory authority and is disqualified by conflict of interest. The approach in

^{1/} ASTCA's petition for arbitration included the latest draft interconnection agreements proposed by each of the parties. This constituted adequate documentation of the unresolved issues, the positions of the parties, and the issues to be resolved by the arbitration, as required by Section 252(b).

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ASLI's draft agreement would be cumbersome and inefficient and would not lead to the development of rational, informed, and consistent interconnection policy.

b. Interstate Access Service

The issues that ASLI identifies as Issues (ii), (iii), (iv), and (v) all relate to interstate and international access matters subject to the FCC's exclusive jurisdiction. The term "toll traffic" is synonymous with long distance traffic, *see* 47 U.S.C. § 153(48). All "toll traffic" originating or terminating in American Samoa is either interstate (*i.e.*, between American Samoa and another U.S. state or territory) or international. All "toll traffic" is therefore subject to the FCC's exclusive jurisdiction. ^{2/}

Thus, "the manner in which ASLI's toll traffic will be transported across ASTCA's local network" (ASLI's Issue (ii)) and "the charges for such transport" (ASLI's Issue (iii)) cannot be addressed by the TRC. As noted above, ASLI admits that its Issue (v), "the terms of interexchange access," is beyond the TRC's arbitration authority.

Similarly, the TRC cannot arbitrate a dispute regarding "the inconsistencies between the two interconnection agreements proffered by ASTCA" (ASLI's Issue (iv)). ASLI is referring to (a) ASTCA's draft agreement addressing interconnection of local traffic and (b) ASTCA's draft interim agreement addressing

^{2/} 47 U.S.C. § 152(a); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013, ¶ 1033 (1996) ("Local Competition Order"), *aff'd in pertinent part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *aff'd in part and vacated in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *Supreme Court review pending*. The FCC held, with respect to calls originating from or terminating to a wireless carrier (such as ASLI), that the "local area" for purposes of distinguishing between local interconnection (under Sections 251-252) and long distance access charges (under Sections 201-205) is a Major Trading Area ("MTA"), as defined in a specified Rand McNally atlas. *Local Competition Order*, 11 FCC Rcd at 16015, ¶ 1036. American Samoa constitutes a single MTA, so calls within the territory fall under local interconnection arrangements, and toll calls to or from points outside American Samoa would be subject to access charges.

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interconnection of toll traffic pending the filing of an access tariff with the FCC. The second of these two agreements is thus beyond the TRC's authority, so the TRC cannot arbitrate the differences between the two agreements. Moreover, the differences between these two drafts are justified by the differences between the jurisdictional nature of such traffic: access charges for long distance traffic are subject to the tariff provisions in Sections 201-205 of the Act, while interconnection arrangements for local traffic are subject to Sections 251 and 252 of the Act.

In any event, ASTCA intends to file an interstate access tariff with the FCC in the very near future, pursuant to Sections 201-205 of the Act. If ASLI has any objections to the rates, terms, and conditions provided in that tariff, ASLI can present its objections to the FCC. ASTCA has no intention to violate Section 202, which prohibits unjust and unreasonable discrimination, by negotiating special access charges available to some interexchange carriers but not to others, as ASLI apparently desires. For example, ASLI's draft agreement apparently seeks a special reduced access charge for toll traffic from ASLI's own interexchange carrier. Such a discount could constitute unlawful discrimination under Section 202 of the Act. ASTCA's FCC tariff will make its interstate access service available at equal terms for all carriers, as required by the Act.

3. Other Differences Between ASTCA and ASLI May Or May Not Exist

As noted above, ASTCA's initial request for arbitration addressed only the dispute over the scope of the Governor's authority, because that was the only issue highlighted in ASLI's correspondence. There were other differences between ASTCA's positions in its most recent draft interconnection agreement (submitted on November 19, 1998) and ASLI's positions in its previous proposed agreement of November 4, 1998. But ASLI has made no specific response, except to insist on its previous proposed agreement of November 4, 1998, and to challenge the Governor's role as regulator and arbitrator.

It appears that ASLI has acceded to ASTCA's positions with respect to issues other than those discussed above. If this is indeed the case, then ASTCA urges ASLI to so state.

On the other hand, other substantive differences may remain between the parties. Below we summarize two principal areas in which ASTCA's and ASLI's

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most recent contract proposals differ, and we provide the justification for ASTCA's position.

a. "Most-Favored Nation" Treatment

The ASTCA draft agreement tracks the statutory language in Section 252(i) of the Act, and requires ASTCA to make interconnection available to ASLI under the terms of any interconnection agreement approved for another party under sections 251 and 252 of the Act (section 9.12). ASLI proposes broader language which allows ASLI to invoke the terms of any interconnection agreements regardless of whether such agreement has been approved under Sections 251 and 252 of the Act.

When Congress enacted the Telecommunications Act of 1996, many interconnection agreements were already in place between carriers. Many of those agreements did not meet the new requirements of Sections 251 and 252. Congress did not require the terms of such unapproved agreements to be made available to other carriers. Congress required only that agreements approved by a State commission under Section 252 be made available to other carriers. 3/

b. Charges for Use of Tandem Switch

Under the ASTCA draft agreement (Attachment A), ASLI would pay an additional 0.3¢ when it uses ASTCA's tandem switch (*i.e.*, when its traffic is terminated over *both* the ASTCA tandem switch and an ASTCA local switch, rather than being terminated over an ASTCA local switch only). ASLI proposes to impose the same additional 0.3¢ charge upon ASTCA when ASTCA's traffic passes over ASTCA's tandem switch before being terminated on ASLI's network. In essence, ASLI appears to be proposing to charge ASTCA for using ASTCA's own tandem switch. This unreasonable proposal should be rejected.

3/ See *Local Competition Order*, 11 FCC Rcd at 16145, ¶ 1322 (concluding that Section 252(i) *does* "apply to agreements negotiated prior to enactment of the 1996 Act," but *only* if such agreements have been "approved by the state commission pursuant to section 252(e)").

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4. Conclusion

In conclusion, ASTCA reiterates its desire to resolve any and all differences with ASLI and to implement a TRC-approved interconnection agreement as expeditiously as possible. This will enable both parties to discharge their interconnection obligations under Section 251(a) of the Act and Section 12.0603(B) of the American Samoa Regulations of Local Telecommunications Operations, and will benefit the people of American Samoa.

Respectfully submitted,



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